IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1371

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

v.

GREAT COASTAL EXPRESS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OPINIONS BELOW

The opinion of the District Court denying defendant's motion for judgment notwithstanding the verdict and for a new trial, but granting a partial new trial is reported at 350 F.Supp. 1377. It is reproduced at pp. 1a-11a of the separately bound Appendix to this petition (hereafter "App."). The opinion of the Court of Appeals is reported at 511 F.2d 839 and is reproduced at App. 16a-31a. The opinion of the Court of

Appeals denying rehearing is not reported and is reproduced at App. 33a-34a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 21, 1975 (App. 32a). A timely Petition for Rehearing was denied on November 14, 1975 (App. 33a-34a). On January 15, 1976 and March 12, 1976, Mr. Chief Justice Burger entered orders extending the time for filing this Petition to March 25, 1976. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Under Rule 59(a) of the Federal Rules of Civil Procedure, which codifies the decision in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494, may a District Court grant a partial new trial limited to damages only, after a general verdict in a jury trial, where:

a) the Court has determined that the jury, despite his instructions, was influenced by evidence of "gross and vicious conduct" not attributable to the defendant, and thereupon returned a verdict far in excess of what the evidence permitted and what the plaintiff claimed; and

b) the evidence before the first jury showed that the defendant had engaged in some lawful strike activity against the plaintiff, and in several other incidents of strike activity, of which the jury could have found one or more to be unlawful, and the plaintiff is entitled to recover only for damages proximately caused by unlawful activity (*Teamsters Union* v. *Morton*, 377 U.S. 252)?

2. In a suit under § 303 of the Labor-Management Relations Act where the defendant union has engaged in some lawful strike activity against the plaintiff, and some activity which violates § 8(b)(4) of the Act, does not the plaintiff have the burden of proving that its strike losses were proximately caused by unlawful activity? In such a suit, may a plaintiff recover any damages where it fails to establish that any of its strike losses were proximately caused by unlawful activity?

STATUTE AND RULE INVOLVED

This case involves §§ 8(b)(4)(B) and 303 of the Labor-Management Relations Act of 1947, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 158(b)(4) and § 187. It also involves Rule 59(a) of the Federal Rules of Civil Procedure. These provisions are set forth in Appendix B of this Petition, p. 1b, *infra*.

STATEMENT OF THE CASE *

A. The District Court

1. *The Complaint and the Liability Trial.*

Petitioner International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (hereinafter "IBT" or "the International") is a labor organization with local affiliates in the United States and Canada. Respondent Great Coastal Express, Inc. (hereinafter "Great Coastal") is an interstate freight trucking corporation, covered by the Act.

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* References to I JA are to the first volume of the Joint Appendix (first trial); references to II JA are to the second volume of the Joint Appendix (second trial); and references to III JA are to the third volume of the Joint Appendix (additional exhibits from both trials). Tr. refers to the transcript not reproduced in the Joint Appendix.

Great Coastal originally brought this action in December, 1970 in the Law and Equity Court of the City of Richmond, Virginia, seeking compensatory and punitive damages for violence and illegal secondary boycott activity which allegedly occurred during a strike conducted by Local 592 of the IBT. Great Coastal named only the IBT as a defendant. The IBT, invoking federal jurisdiction pursuant to §§ 301 and 303 of the Act, removed the action to the United States District Court for the Eastern District of Virginia.

The case was tried to a jury in June, 1972. The evidence showed the following:

Great Coastal's collective bargaining agreements with drivers and other employees represented by local affiliates of the International expired on March 31, 1970 (I JA 108). Negotiations between Great Coastal and Teamsters Local 592 failed to result in agreement (I JA 123, 372), and on August 9, 1970 a strike began in Richmond, which soon spread to Great Coastal's other terminals in Philadelphia and New Jersey (I JA 122-123). Great Coastal continued to operate trucks throughout the strike using office employees, salesmen and newly hired replacement drivers (I JA 123). In mid-August the president of Local 592 sent letters to Great Coastal's customers announcing the strike and advising them that Local 592 would follow the Great Coastal trucks and would picket the Great Coastal employees while they were making deliveries on the customers' premises, in accordance with the standards established by the Labor Board "in a series of cases beginning with *Moore Dry Dock Co.*, 92 NLRB 547" (III JA 937).

In addition to picketing at Great Coastal's terminals, Local 592 utilized roving pickets who attempted to follow Great Coastal's trucks and to set up picket lines at their destinations (I JA 126). The pickets were given written instructions to confine their picketing to the times when Great Coastal equipment and employees were on a customer's premises, to picket as close to the trucks as possible, and to respect the customers' wishes with regard to picketing on their property. The pickets were also instructed to speak to no one while picketing and carried signs stating clearly that the local's dispute was solely with Great Coastal (III JA 959-961).

The pickets were further instructed that prior to establishing a picket line on or near the property of a Great Coastal customer, they were to approach the top available managerial person, hand him a copy of the letter to customers, and request that he refuse to load or unload the Great Coastal truck, or alternatively that he allow them to picket the truck directly on the property of the customer. If such permission was denied, the pickets were instructed to establish their line on public property as physically close to the Great Coastal truck as possible (I JA 388-390). There was little testimony with respect to any activity at the premises of Great Coastal's customers. The only testimony from which a jury could possibly find specific instances of secondary boycott activity was limited to eight incidents over the eight months of the strike. These incidents are described in Appendix C to this Petition, pp. 1c to 3c, *infra*. As a reading of Appendix C will show, even as to those eight incidents, the evidence was both slight and equivocal.

There was other general testimony to the effect that customers of Great Coastal refused to accept shipments during the strike (I JA 238-251, 262-263, 371, 328). However, that testimony dealt only with the fact that shipments were refused. There was no evidence from which the reason for such refusal could be determined, let alone any evidence that it was due to unlawful secondary boycott activity.

The bulk of plaintiff's presentation was devoted to tales of violence including death threats (I JA 199); threats of physical harm (*e.g.,* I JA 200, 202, 206, 209, 347); bodily assault (*e.g.,* I JA 202); gunshots (*e.g.,* I JA 211-212, 223, 286, 353); deliberate vehicular collisions (*e.g.,* I JA 204, 212, 302, 344); and other physical damage to vehicles (*e.g.,* I JA 221, 324, 347, 356).

The evidence with respect to International authorization, ratification or participation in strike activities established that it had supplied strike benefits of up to $25 per week to individual strikers, that it had provided $10,000 to the depleted treasury of Local 592, and that one of its vice-presidents had solicited its other, non-involved affiliates to provide "any assistance you can legally give" to the striking locals (I JA 387, 392; II JA 542).

Great Coastal's only witness on the issue of damages was accountant John Lepp. He testified that he had examined the books of Great Coastal Express for the periods preceding, during and after the strike. Beginning in August, 1970, when the strike started, he noted a disruption in the company's general pattern of receipts and profits. On the basis of the company's business growth pattern and operating ratio over a period of time prior to the strike, Mr. Lepp projected a figure for anticiated profit during the period of the strike of

$322,438. He added to this figure the actual loss suffered by the company during the period of the strike, $274,895, to reach a total damage figure of $597,333. He then computed a projected profit figure of $495,715 for the period from the end of the strike to the end of 1971, again using pre-strike growth patterns and operating ratios. He subtracted from this figure the smaller profit which the company actually showed in the immediate post-strike period, and came up with an additional figure of $344,732. He added this to the $579,333 to reach his total damage estimate of $942,065 (I JA 118-151).

Lepp testified on cross-examination that these damages were attributable to the strike generally and that he did not know what portion of this loss was attributable to lawful strike activity and how much could be ascribed to any unlawful activities (I JA 152-153).

2. *The Court's Directed Verdict on Violence, the Jury's $1,300,000 Verdict, and the Court's Ruling Thereon.*

At the conclusion of the plaintiff's case, the trial court granted a motion for a directed verdict with respect to strike violence holding that as a matter of law plaintiff had the burden "to prove [that portion of its] case by clear, convincing evidence" as required by § 6 of the Norris-LaGuardia Act, and had failed to "sustain that proof" (I JA 384). While the court expressed "serious doubts that the plaintiff had shown that the International [was] liable for the alleged secondary boycott actions" or "that the plaintiff has shown with the degree of proof * * * required * * *, the damages flowing from the alleged secondary boycott actions" it allowed the case to go forward on those issues (I JA 384-385).

The case was submitted to the jury on plaintiff's claim that it had sustained actual damages of $942,065 in unrealized profits during and as a consequence of the strike (I JA 452). The Judge instructed the jury:

> "Now, * * * you will recall there was testimony * * *, during the course of several days, in reference to certain acts of violence which, as despicable as they may well have been, are not to be considered by you in reference to any damages which you may ultimately award in this case because as a matter of law the Court has ruled that the only issue to be determined by this jury has to do with the secondary boycotting which I will discuss further." (I JA 457).

The jury returned a general verdict against the International of $1,300,000 (I JA 486-487).

The International filed a motion for judgment notwithstanding the verdict or for a new trial, raising among other issues, manifest jury prejudice by reason of the admission of evidence of strike violence and the insufficiency of proof of agency by which the International could be held liable for acts of its members and/or local affiliates. On November 22, 1972, the court by memorandum opinion, decided that the evidence was sufficient to go to the jury on the issue of the International's responsibility (App. 4a-5a), and that its instructions to the jury for determining whether conduct which violated §8(b)(4) were correct (*id.* 7a-10a). However, the Court was "of the further opinion that the jury * * * was in spite of the Court's instructions to the contra influenced in its consideration of damages by the gross and vicious conduct attributed to the members of the local union and their sympathizers. This is reflected in its verdict which exceeded even the

claims of plaintiff's persuasive advocate by more than $300,000." The court concluded that the "appropriate remedy" was "a remand for new jury determination as to damages" and denied all other relief. (App. 6a-7a).

3. *The Damage Retrial.*

Great Coastal's principal witness on damages was again accountant John Lepp, who testified that he had examined the books of the company for periods preceding, during and after the strike, and assuming an established growth factor, had calculated loss of profits of $942,065. (II JA 828-834). However, he made no attempt to relate any of this loss to illegal activity. This was acknowledged after cross-examination;

> "Q. During the periods that you had under study, there was a certain reduction in the revenue of Great Coastal?
> A. Yes sir.
> Q. Now, for all you know, that reduction could have been caused by lawful strike activity, could it not? You didn't make a study to determine the cause of these losses, did you?
> A. No sir." (II JA 846).

Mr. Lepp was also unable to link any loss of revenue to unlawful activity:

> "Q. But you don't know whether it was caused by lawful activity on the part of the union or unlawful activity or simply because a customer became disenchanted with Great Coastal?
> A. I know it was caused by the strike.
> Q. That is all you know?
> A. Right. It was caused by the strike." (II JA 847).

Charles Edwin Estes, president of Great Coastal, over objection, was permitted to state his opinion as to why business was lost (II JA 720). No foundation was laid for the expression of his opinion, and the trial court expressly acknowledged its incompetence by instructing the jury to disregard it (II JA 916).

At the conclusion of Great Coastal's case, the International moved for a directed verdict based primarily upon Great Coastal's failure to offer any evidence to establish damages flowing from illegal activities as differentiated from its overall strike loss. The trial court, while admitting doubt, denied the motion "to see what happens with [the] jury" (II JA 910). Over objection (II Tr. 343-345, 348, 370-373), the Court instructed the jury:

> "And the Court tells you that in that [prior] trial it was found that by following the plaintiff's trucks and picketing at the premises of certain of the plaintiff's customers, an object of the defendant union was to induce employees of certain of the plaintiff's customers to refuse to handle the plaintiff's freight. It was found that these actions of the defendant union did, in fact, cause the employees of certain of the plaintiff's customers to refuse to handle the plaintiff's freight, and that losses were suffered by the plaintiff by reason of its inability to move its freight and were caused by such unlawful secondary boycotting activities of the defendant union.
>
> "So I tell you now, that has been established. * * * There isn't any argument about it, that the defendant union overstepped its bounds, so to speak, and permitted illegal acts for which they are liable in damages, providing, the plaintiff can prove by a preponderance of the evidence that damages were incurred as a proximate cause of

> that illegal activity, that is, damages flowed from that illegal activity.
>
> "You understand, of course, that you may not award the plaintiff damages simply because of lost money during the strike or for money lost as a result of the union engaging in legal and permitted activity. In a strike situation, infliction of losses both upon the union and the employer is to be expected. It is not an occasion for liability unless the losses resulted from illegal strike activity. For this reason, you may only award damages where Great Coastal has proved by a preponderance of the evidence that it was so damaged.
>
> "Now, there was some evidence here, I believe, of letters going to customers, and the Court tells you that, under the law, it was perfectly permissible for the union to ask customers of Great Coastal not to do business with Great Coastal during the course of the strike. And activity such as that is not to be considered by you in determining the amount of damages that Great Coastal has suffered." (II JA 920-922).

The jury returned a verdict of $806,093. The International moved for judgment notwithstanding the verdict or for a new trial as to all issues, basing its motion, among other things, on the impossibility that a jury could properly assess damages caused by illegal secondary boycott activity when it had heard no evidence with respect to the extent of such unlawful activity. The motion was denied (II JA 933).

B. The Court of Appeals

The International appealed from the judgment against it, and Great Coastal cross-appealed with respect to the Court's direction of a verdict against it on the allegations of violence.

The Court of Appeals affirmed. It held that there was sufficient evidence to go to the liability jury on the issue of the International's responsibility for the unlawful secondary activity (App. 22a-24a). It held also, that a partial new trial on damages only was permissible. It examined for itself the basis of the liability jury's verdict and concluded that there "is no basis to support the defendant's contention that the first verdict was fatally infected by prejudice," citing *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 485, discussed *infra*, pp. 24-25. The Court also concluded that the issues of liability and damages were not so closely intertwined that the second jury could not consider the issue of damages apart from liability, (App. 29a-30a), and that the court's instructions on proximate cause were adequate (App. 24a-25a, 30a-31a). It did not state how the damage jury could have determined, even with the most perfect instructions, what loss had been proximately caused by conduct which the liability jury had found to be illegal, or by conduct which the liability jury had not found to be illegal.

The Court of Appeals also rejected the IBT's contention that Great Coastal had not presented sufficient evidence to go to the damage jury, because it had submitted evidence of its total strike loss only, without showing that *any* of that loss was proximately caused by a violation of § 303, purporting to apply *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, discussed *infra*, pp. 35-41. (App. 25a).

Thereafter, the IBT filed a petition for rehearing or for rehearing *en banc* which was denied. (App. 33a-34a).

REASONS FOR GRANTING THE WRIT

Introduction and Summary

I. Rule 59(a), F.R.Civ.P., which authorizes the granting of new trials "on all or part of the issues", codifies the decision of this Court in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494.[1] The Court there held that the granting of a partial new trial in an action triable before a jury does not contravene the Seventh Amendment. But *Gasoline Products* "stated an important limitation on the power to grant a partial new trial that must be kept in mind."[2]

> "Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without justice. * * * Here the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty which would amount to a denial of a fair trial." *Id.* at 500.

There are two classes of cases in which the grant of a partial new trial limited to only some issues may not be "had without injustice". The first is where it cannot be said that the error which requires the granting of a new trial did not affect the jury's determination of the case as a whole; the second is where the issues are so interwoven that, as in *Gasoline Products*, one "cannot be submitted to the jury independently of the [other] without confusion and uncertainty" (283 U.S. at 500).

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[1] See 6A Moore's *Federal Practice* (hereafter "Moore"), ¶ 59.02, p. 59-6.

[2] 11 Wright & Miller, *Federal Practice and Procedure: Civil* (hereafter "Wright & Miller"), § 2814, p. 96.

The instant case is extraordinary, if not unique, in that the limitation of the new trial to the issue of damages was impermissible for *both* of these reasons.

First, petitioner was denied a fair trial on the issue of liability. In Professor Moore's words:

> "* * * where the damages are excessive and the verdict is the product of passion or prejudice a new trial as to all the issues must be ordered." [3]

Here, although the trial court determined that the jury had been influenced by improper consideration of "gross and vicious conduct" (not attributable to the defendant) in returning an award far greater than the plaintiff's claim (App. 6a-7a), it nevertheless granted a new trial on damages only. This decision "amount-[ed] to a denial of a fair trial" (283 U.S. at 500) to the defendant with respect to liability. As this ruling involves the fundamental right of each litigant to have every issue determined by a tribunal uninfected with prejudice, it plainly merits this Court's attention in the exercise of its supervisory powers over the administration of justice in the federal courts. That power is additionally implicated by the Court of Appeals' speculation (without record support and contrary to the standards of *Gasoline Products*) that the jury may have acted properly, for that court thereby substituted its own views for those of the trial judge, with respect to a subject within his special competence —as this Court has held in an opinion by Brandeis, J. which the court below cited, but unfortunately misapplied. Lastly, the decision below should be reviewed on this issue in order to harmonize this case with this

[3] Moore, ¶ 59.06, p. 59-84, citing, *inter alia*, *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.* v. *Moquin*, 283 U.S. 520, quoted, p. 19, *infra*.

Court's precedents and with decisions of other courts of appeals with which the decision below cannot be reconciled.

Second, because of the applicable substantive law, this action is in the class described by Prof. Moore where "the amount of damages may not be determined without a redetermination of the liability issue [so that] a new trial as to all the issues must be ordered." [4] That substantive law is declared in *Teamsters Union* v. *Morton*, 377 U.S. 252, which holds that in a suit under § 303 a plaintiff may recover only those losses which were proximately caused by a violation of § 8 (b)(4); a plaintiff may not recover losses proximately caused by primary strike activity even if some of the union's other conduct violated § 8(b)(4). *Id.* at 260-262, quoted at pp. 25-26 *infra*. Because the basis of the first jury's liability determination was unknown to the second jury, it was a logical impossibility for the latter to determine what losses were proximately caused by conduct for which the first jury had found defendant liable and to restrict its damage award to losses so caused. What should have been self-evident as a matter of logic was confirmed by experience at the damage trial: Plaintiff introduced evidence only as to its total strike losses, making no effort whatsoever to connect all or part of those losses with particular incidents of secondary activity which had been before the first jury and on which that jury even *might* have based its liability determination. The trial court instructed the second jury that it was to take as given the proposition that the union had been found guilty of illegally causing "the employees of *certain* of the plain-

[4] *Id.*, pp. 59-81 to 59-82.

tiff's customers to refuse to handle the plaintiff's freight" (II JA 920, emphasis added); it did not, because it could not, identify those "certain" customers. Inevitably, therefore, the damage jury had no basis whatever for determining what losses were proximately caused by those acts of picketing which the liability jury had determined to be illegal, and what losses were lawfully inflicted.

Violation of the precepts of *Gasoline Products* thus became the instrument for depriving the defendants of their right under *Morton* not to be assessed damages for strike losses inflicted by lawful primary activity, and defeated Congress' policy in limiting the § 303 remedy. Review of this case is therefore essential to preserve that policy. And its importance extends well beyond the § 303 context; for, if liability and damages may be tried separately in a case where law and logic render them inseparable, the lower courts will at best be uncertain whether anything of substance remains of the "important limitation" on the granting of a partial new trial established in *Gasoline Products* and previously honored by the courts of appeals in administering Rule 59(a).

II. In holding that the plaintiff submitted sufficient evidence to go to the jury on the issue of damages, although it introduced no evidence that any of its strike losses were proximately caused by unlawful activity, the Court of Appeals further undermined the Congressional policy declared in § 303 as construed in *Morton*. The Court relied on the *Story Parchment* case, 282 U.S. 555, which holds that where uncertainty in the amount of damages is due to the actions of the tortfeasor the plaintiff may recover damages caused

by the tort upon a just and reasonable approximation thereof. But there are three reasons why *Story* does not justify the result reached by the Court of Appeals: 1) *Story* does not dispense with the plaintiff's burden to establish the fact of damage without speculation (see *id.* at 262); it is that burden which Great Coastal failed to meet. 2) The *Story* rule applies only where the tort created the uncertainty; here, there was no reason other than plaintiff's own choice why it could not have established damages proximately caused by tortious conduct with specificity. 3) The *Story* rule does not, as we show below, on the basis of reason and authority, apply in a case like the present which requires apportionment between losses lawfully inflicted on the plaintiff and losses unlawfully inflicted upon him. In short, there is no tension between the proof requirements of *Morton* and the holding of *Story*.

This Court so recognized in *Morton* itself where the respondent relied heavily on *Story* in order to recover the damages which this Court denied him on the basis of the "by reason of" language in § 303 (377 U.S. at 261-262). See Brief for Respondent, No. 485, Oct. Term, 1963, pp. 17-23.

Unless a plaintiff in a § 303 suit is required to prove that the losses which he claims were proximately caused by violations of § 8(b)(4), rather than by lawful strike activity, this Court's holding in *Morton* will be stripped of all vitality. Employers and their counsel will not be slow to grasp the object lesson which Great Coastal's recovery provides. To avoid future abuses of § 303, and to preserve the intent of Congress so clearly articulated in *Morton*, the judgment of the Court of Appeals should be reviewed and ultimately reversed.

I. BY DIRECTING A NEW TRIAL RELATED TO THE ISSUE OF DAMAGES, THE DISTRICT COURT DENIED PETITIONER A FAIR TRIAL ON LIABILITY AND ITS RIGHT UNDER TEAMSTERS UNION v. MORTON, 377 U.S. 252, TO BE ASSESSED FOR ONLY THOSE DAMAGES PROXIMATELY CAUSED BY UNLAWFUL CONDUCT.

A. Petitioner Was Denied a Fair Trial Because the Liability Jury's Verdict Was Fatally Infected by Prejudice.

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison,* 349 U.S. 133, 136; *Groppi* v. *Wisconsin,* 400 U.S. 505, 509. The jury which established defendant's liability did not satisfy that basic requirement. The jury returned a verdict for $1,300,000, an amount for which there was not a shred of evidence in the record, and which exceeded plaintiff's own claim by over $350,000. The District Judge set aside the verdict for damages saying "the jury, while well intentioned, was in spite of the Court's instructions to the contra influenced in its consideration by the gross and vicious conduct attributed to the members of the local union and their sympathizers" (App. 6a). But despite his own finding of prejudice, the Judge accepted the jury's verdict as establishing defendant's liability and ordered that the new trial be limited to the question of damages. He thereby deprived defendant of its right to a fair trial on the issue of liability, and departed from the teachings of this Court.

In *Minneapolis, St. Paul & Sault Ste. Marie Railway Co.* v. *Moquin,* 283 U.S. 520, the issue was whether when a state trial court determines, in an action under the Federal Employers' Liability Act, that a jury verdict was infected with passion and prejudice, the court may direct a remittitur of damages which it regards as excessive, or whether it must grant the defendant a new trial. This Court directed a new trial:

> "In actions under the federal statute no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent." (*Id.* at 521-522).

Again, in *Dimick* v. *Schiedt,* 293 U.S. 474, 486, the Court said:

> "Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but, in that event, both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages."

The denial of a new trial with respect to liability was also in conflict with recent decisions of the Second [5] and Eighth [6] Circuits;[7] it is also contrary to the

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[5] *Sharkey* v. *Penn Central Transportation Co.,* 493 F.2d 685, 689 (C.A. 2):

> "It is apparent that the verdict here was unconscionable and reflected a prejudice against the carrier, exacerbated by an intemperate summation which resulted in a punitive verdict. • • • Under the circumstances, the verdict was clearly excessive.[2] While the trial court recognized this, the remittitur was nonetheless totally unrealistic. In fact, it is difficult to understand on what basis it was computed. We are there-

views of the leading commentators on federal practice.[8]

On this point the decision below also contravenes the holding of *Gasoline Products, supra* (decided on the same day as *Moquin*), that the power to grant a partial new trial may be exercised only if "it *clearly appears* that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice * * *" (283 U.S. at 500, emphasis added). That decision has properly been understood by the courts of appeals as holding that the power to grant a limited new trial "is to be exercised with caution and not when the error which necessitates a new trial is in respect of a matter which *might well have* affected

fore convinced that the judgment here must be reversed and a new trial ordered."

In Footnote 2 the Court "noted that the jury's original verdict of $125,000 was precisely the sum twice suggested to them by plaintiff's counsel in summation * * *". Here the verdict was substantially *greater* than that which plaintiff claims.

[6] *Perry* v. *Bertsch*, 441 F.2d 939, 946 (C.A. 8):

> "The verdict is so excessive as to shock our conscience, and we conclude that the ends of justice will best be served by the district court's setting aside the judgment. We, therefore, reverse and remand this case for a new trial."

[7] The decision below is also an abrupt departure from two earlier decisions in the Fourth Circuit which were limited to their precise facts, *Ford Motor Co.* v. *Mahone*, 205 F.2d 267, 272 (C.A. 4); *United Construction Workers* v. *Haislip Baking Co.*, 223 F.2d 872, 879 (C.A. 4). See App. 27a-28a.

[8] See Moore, quoted at p. 14, n. 3 *supra*, and *id.* ¶ 59.08[4], p. 59-125: "Since the jury should act fairly and impartially, a new trial should be granted when the verdict is the result of mistake, passion, prejudice, or improper motive on its part." See also 11 Wright & Miller, § 2814, pp. 96-97, as corrected in 1975 Pocket Part, p. 8.

the jury's determination of other issues."[9] Where, as here, a jury renders a flagrantly excessive verdict which was, as the trial judge found, influenced by improper considerations, a court "cannot confidently say"[10] that the jury was not likewise influenced by improper considerations in determining the defendant to be liable. On the contrary, it is utterly implausible to surmise that a jury which, despite the Court's instructions, was influenced by "gross and vicious conduct attributed to members of the local union and their sympathizers" (App. 6a) in considering *damages*, would not have been influenced by this conduct when considering *liability*, which was, as it knew, a necessary predicate for the enormous award it believed this defendant should pay.

The opinion of the Court of Appeals herein provides an object lesson of the inadvisability of such speculation and the wisdom of the rule which requires a new trial on all issues where "subtle subjectiveness of jury determination leaves [the] court in doubt as to the propriety of the jury's determination" on any issue,

[9] *Geffen* v. *Winer*, 244 F.2d 375, 376 (C.A.D.C., emphasis added).

[10] The language quoted is from an extensive discussion of the *Gasoline Products* rule in *Camalier & Buckley- Madison, Inc.* v. *Madison H., Inc.*, 513 F.2d 407, 420-422 (C.A.D.C.).

The Court also said:

> "Whether these or other possible consequences actually followed the handling of the matter is something we will never know. It is enough, however, that one or more may have; and viewing the situation realistically, we cannot confidently say that none did. In other words, we lack reasonable assurance that Madison did not suffer injustice through misapprehension of the jury as to something material to the verdict. Our duty, then, is to afford Madison a new trial on damages as well as liability." *Id.* at 422.

Williams v. *Slade,* 431 F.2d 605, 609 (C.A. 5).[11] The Court of Appeals attributed to the District Judge the "conclusion that the first verdict was based on honest judgment by a well-intentioned jury" (App. 29a), and thereupon substituted for the District Court's explanation of the jury's verdict, its own hypothesis:

> "The court charged the jury that no acts of violence testified to could be considered in assessing any damages, and that damages were limited to losses which flow proximately from any illegal activity the jury might find. During deliberations, the jury inquired of the court, 'What amount of damages lost in dollars is the plaintiff asking? Is it the $942,065 figure?,' to which the court responded '. . . yes . . . I must tell you that you are not to concern yourselves with what the plaintiff asks for unless it coincides with the evidence as you find it.' 350 F.Supp. at 1378. It is obvious from the foregoing that the jury did not consider the $942,065 as a limiting figure, but we are unable to say from the record that the excessive verdict was caused from anything more than a misunderstanding of the jury charge as not limiting the recovery to pecuniary loss as mentioned in the question asked the court." (App. 29a).

[11] The foregoing follows a thorough analysis of the standard which *Gasoline Products* requires for determining whether there may be a partial new trial:

> "In other words, a court may properly award a partial new trial only when the issue affected by the error could have in no way influenced the verdict on those issues which will not be included in the new trial. If the decision on the other issues could in any way have been infected by the error then a new trial must be had on all issues. For example, partial new trials as to damages alone have been rejected when it appeared that the error on the damage issue affected the determination of liability." *Id.* at 608.

Not only is the Court of Appeals' hypothesis utterly without basis in the record,[12] it fails to address the critical issue in determining whether it "clearly appears" that liability and damages were "separate and distinct" in the jury's consideration. Granting that the jury erroneously believed, for *any* reason, that it had the power to enter a verdict in excess of the plaintiff's demand, although that award had no basis in the evidence, why did the jury exercise that power in this case? Surely the correct answer is that of the District Judge, that the jury did so because it was moved by the evidence of violence which it had been instructed not to consider. If that assessment is accepted, it does not "clearly appear" that liability and damages are "separate and distinct"; rather, it is evident that the jurors could have given the defendant a fair trial on liability only by a psychological feat which in reason should not be, and under the precedents which we have cited, may not be, attributed to them.

The error which the trial court made was its failure to draw the legally required conclusion from that determination. The Court of Appeals compounded that error by transgressing its proper appellate role, for

[12] The idea that the verdict may have been based on the jury's view that it was empowered to award damages for other than "pecuniary loss" originated in the Court of Appeals' opinion. Pecuniary loss was *not* "mentioned in the question asked the court" (App. 29a); as we have seen, the jury inquired only as to the amount plaintiff was asking. And plaintiff never even suggested that the jury should award damages in excess of the $942,065 which it asserted to be its actual strike loss; nor did it assert *any* non-pecuniary loss. Even on appeal it did not advance the explanation of the jury's behavior which the Court of Appeals adopted; indeed, plaintiff said *nothing* on the point that the liability verdict was infected with prejudice, although this was the first point in the union's brief on appeal.

the Courts of Appeals should not substitute their own views for those of the District Courts in interpreting jury behavior. Ironically, the one decision which clearly establishes that both courts below were wrong, is the opinion of Mr. Justice Brandeis on which the Court of Appeals mistakenly relied (App. 30a), *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 485:

> "The record before us does not contain any explanation by the trial court of the refusal to grant a new trial, or any interpretation by it of the jury's verdict.[12] In the absence of such expressions by the trial court in the case at bar, the refusal to grant a new trial cannot be held erroneous as a matter of law. Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct."

[12] Compare Minneapolis, St. P. & S. Ste. M. R. Co. v. Moquin, 283 U. S. 520, in which the trial court expressing the opinion that the verdict was excessive because of passion and prejudice, nevertheless refused, on the filing of a remittitur, to grant a new trial."

The Court of Appeals quoted the last sentence of the foregoing in support of the proposition that it (the Court of Appeals) should not speculate "as to what the jury considered in its deliberations" (App. 30a). Since the Court did in fact indulge in such speculation, this statement is somewhat self-defeating. In any event, the present case differs from *Fairmount* in that the record here *does* "contain an interpretation by the trial court of the jury's verdict"; this brings into play not the first proposition stated in the sentence quoted by the Court of Appeals, but the second, that "[a]ppellate courts should be slow to impute * * * to trial courts

a want of diligence or perspicacity in appraising the jury's conduct" (287 U.S. at 485). Yet, as we have seen, the Court of Appeals did just that. And while *Fairmount* held that appellate courts should be slow to determine that juries have disregarded their duties where the trial court is silent, Justice Brandeis did not relieve the appellate courts of responsibility to protect the integrity of the judicial process where the trial court finds that the jury has disregarded its duty, but nevertheless permits its verdict to stand in whole or in part. On the contrary, by contrasting *Fairmount* with *Moquin*, he reaffirmed their duty to correct such errors. On this record then, the reasoning of *Fairmount* compels the result of *Moquin*.[13]

B. It Was Impossible for the Damage Jury to Observe the Prohibition Declared in Morton Against Providing Compensation for Lawful, Primary Strike Activity.

In *Teamsters Union* v. *Morton*, 377 U.S. 252, this Court held unanimously "that recovery for an employer's business losses caused by a union's peaceful secondary activities proscribed by § 303 should be limited to actual, compensatory damages" (*Id.* at 260). The Court held further that "[s]ince § 303(b) authorizes an

[13] The point can profitably be approached in terms of the distinction between issues of fact and of law which was stressed throughout the *Fairmount* opinion, 287 U.S. at 481-485. Interpretation of the jury's behavior was treated as an issue of fact within the special competence of the trial courts; the consequence of a finding that the jury had disregarded its duty was treated as a question of law as to which the appellate courts may not defer. In *Fairmount*, the Court of Appeals was reversed because it had exceeded its proper function by setting aside the District Court's resolution of the question of fact; in *Moquin* the judgment of the Supreme Court of Minnesota was reversed because it had incorrectly decided the question of law. The judgment of the Court of Appeals in this case is subject to reversal on both grounds.

award of damages only in the event of injury 'by reason of any violation of subsection (a)' and peaceful primary strike activity does not violate § 303(a), *Electrical Workers Local 761* v. *Labor Board,* 366 U.S. 667, 672, the District Court was without power to award damages proximately caused by lawful, primary activities, even though the petitioner may have contemporaneously engaged in unlawful acts elsewhere" (*id.* at 261-262). This holding reflected both the language and the legislative history of § 303 (*id.* at 260) as well as the insight that allowing recovery for any peaceful strike activity which did not violate § 8(b)(4) would penalize the use of a "weapon of self-help, permitted by federal law, [which] formed an integral part of the [union's] effort to achieve its bargaining goals during negotiations with the respondent" (*id.* at 259).

The teachings of *Morton* were reaffirmed in *Mine Workers* v. *Gibbs*, 383 U.S. 715, 731, n. 17:

> "In Local 20, Teamsters, Chauffeurs and Helpers Union v. Morton, supra, a similar analysis was applied to permit recovery under § 303 of damages suffered during a strike characterized by proscribed secondary activity only to the extent that the damages claimed were the proximate result of such activity; damages for associated, primary strike activity could not be recovered."

Thus, under *Morton,* plaintiff was entitled to recover for only those losses which were proximately caused by unlawful secondary activity.

During the first trial the jury had heard evidence with respect to a myriad of strike-related activity: picketing at Great Coastal's terminals; direct appeals to Great Coastal's customers; the following of Great Coastal's trucks; the eight instances of possible secondary boycott activity at a customer's premises; and, of course, violence. The first three of these activities were clearly privileged as a "weapon of self-help, permitted by federal law * * *," *Morton*. Whether the eight instances at a customer's premises violated § 8(b)(4) would very much depend on how the jury evaluated those incidents.[14] For, "there are two threads to § 8(b)(4)(B) that require disputed conduct to be classified as either 'primary' or 'secondary,' [a]nd the tapestry that has been woven in classifying such conduct is among the labor law's most intricate." (*NLRB* v. *Operating Engineers,* 400 U.S. 297, 303). Absent specific determinations by the first jury as to which of the incidents of secondary activity were unlawful—that is, in which instances the means and objects proscribed by § 8(b)(4)(B) coalesced—there is no way of knowing or identifying the incident or incidents or the extent of such incidents on which the liability verdict was based. Thus, when the new trial began on the issue of damages, there was no way the District Court could have avoided the possibility that the second jury, charged only with deciding the question of damages, would base that verdict on conduct which the first jury had not found to be unlawful.

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[14] The evidence with respect to at least one of these customers, Southern Special Products Corp., pp. 1c-2c, *infra,* clearly showed that that customer's decision to cease doing business with Great Coastal was not due to illegal secondary activity, since its traffic manager testified that the decision was made at the request of his consignees. Even if the jury would have been authorized to discredit that testimony, and to conclude that the decision was based on the request of two Local 592 officials who met with him, no violation would be established by that incident because such requests are lawful, as *Morton* itself holds, 377 U.S. at 259; see also *Labor Board* v. *Servette,* 377 U.S. 46.

It is clear from the foregoing that under the standard declared in *Gasoline Products, supra,* which we have already discussed at length, it was impermissible to limit the new trial to damages. For, under *Morton's* proximate cause rule, the amount of damages was, as a matter of most elementary logic, "so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial" (283 U.S. at 500). Not only does it fail to "clearly appear * * * that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice," as *Gasoline Products* requires, it clearly appears that the separate trial inevitably deprived the defendant of the right to a judgment limited to those damages caused by activity which was found to be illegal by *some* jury.

In *Gasoline Products,* the Court of Appeals, finding error in the trial court's charge with respect to the measure of damages on a counterclaim, had directed a new trial on that issue alone (*id.* at 496). This Court reversed, saying:

> "The verdict on the counterclaim may be taken to have established the existence of a contract and its breach. Nevertheless, upon the new trial, the jury cannot fix the amount of damages unless also advised of the terms of the contract; and the dates of formation and breach may be material, since it will be open to petitioner to insist upon the duty of respondent to minimize damages.
>
> "But it is impossible from an inspection of the present record to say precisely what were the dates of formation and breach of the contract found by the jury, or its terms." *Id.* at 499.

The situation in the present case is indistinguishable. For here, "upon the new trial, the jury [could not] fix the amount of damages unless also advised" *which* of the incidents of strike activity were found by the jury to have been in violation of § 8(b)(4). And this, the first jury's general verdict could not make known.

The inevitable result was that the damage trial could not be conducted within the framework of *Morton,* which deprives juries of "power to award damages proximately caused by lawful, primary activities, even though the petitioner may have contemporaneously engaged in unlawful acts elsewhere" (*id.* at 261-262).

What the verdict *did* establish was a ceiling on the amount the plaintiff could recover, in conformity with *Morton.* For, if the verdict were interpreted most favorably to plaintiff, it would establish that the eight incidents of ambulatory picketing which were before it (Appendix C, *infra*) constituted violations of § 8(b)(4). Thus, plaintiff was entitled to recover at most the losses proximately caused by these eight incidents. Great Coastal, apparently realizing that the upper limit thus established would result in no recovery or a small one, did not offer to prove what damages were proximately caused by secondary activity. Instead, it presented evidence only of its entire strike loss without relating this loss to illegal activity.

The jury was thus confronted with an impossible task. It knew the amount the plaintiff claimed as its total strike loss, and it was instructed that the verdict of the first jury had established that the defendant had engaged in *certain* unlawful conduct and that the plaintiff was entitled to recover for the losses proximately

caused by that conduct; it was also instructed that the defendant had engaged in some lawful conduct and that the plaintiff was not entitled to recover for losses proximately caused by that conduct.[15] On the basis of this information the jury was called upon to determine how much of plaintiff's strike loss was proximately caused by conduct which the first jury had determined to be illegal. It plainly lacked the following information which was indispensable to a rational performance

[15] In describing the trial court's instructions to the damage jury, the Court of Appeals said: "*The judge again correctly charged the jury which ambulatory picketing activities were lawful, and which were unlawful,* and among several references to proximate cause in his charge which required the company to prove its damages were proximately caused by the unlawful activities of the union as contrasted to the lawful, told the jury: * * *" (App. 24a, emphasis added). The underscored portion of the foregoing misreads the trial court's instruction on this point, which we have quoted in full at pp. 10-11 of the Statement. Moreover, it is self-evident that the judge could not have charged the jury *which* ambulatory picketing activities the first jury had found to be lawful and which it had found to be unlawful, because the trial judge could not have known this, given the general verdict.

The Court of Appeals also stated, in approving the trial court's instruction, that "plaintiff took the position and offered evidence which tended to show that all its damages claimed in the second trial were caused by the unlawful activities of the defendant as distinguished from the lawful." (App. 31a) It is true that plaintiff took this position, but the only evidence it offered was the opinion of Great Coastal's President Estes, which was admitted over objection, and which the jury was instructed to disregard. *See* pp. 9-10, *supra*. Significantly, the Court of Appeals does not describe the "evidence" to which it refers, and in its prior discussion of the same point (App. 24a), it describes the plaintiff's aforesaid position, but does not state that it offered any evidence. Here again, it is not even necessary to look at the record, because Mr. Estes could no more have known what the first jury determined to be unlawful than could the trial judge, or anyone else. Thus, quite aside from its other infirmities, Estes' opinion was worthless because of the bifurcation of the liability and damage trials.

of this task: 1) it could not identify the incident or incidents which the first jury had determined were illegal (and for which alone the plaintiff could recover); and 2) it did not know with respect to any conduct (whether legal or illegal under the first jury's verdict) what loss, if any, it inflicted on the plaintiff. The first of these fatal gaps in the jury's information was the inevitable consequence of the decision to hold a separate damage trial. The second was the consequence of plaintiff's trial strategy. The result was a verdict of $806,093, of which one can say at most that it may have been the jury's calculation of plaintiff's total strike loss, but of which it certainly cannot be said that it granted recovery only for damages proximately caused by activity which the liability jury had found to be illegal.

The ramifications of the procedure sanctioned in this case are of wide-ranging significance, for if the restrictions declared in *Gasoline Products* on the granting of a partial new trial may be ignored in this case, they may be ignored in any other case. No situation is imaginable in which liability and damages are more clearly interwoven. The innovation in applying Rule 59(a) F.R.Civ.P. sanctioned by the court below amply warrants review in the exercise of this Court's supervisory powers. And if there is doubt that the Court of Appeals' disregard of the "important limitation on the power to grant a new trial" [16] declared in *Gasoline Products* is sufficient to warrant review, then it would surely be dispelled by the conflict between the decision below and those of other courts of appeals which have been faithful to those precepts. We particularly invite the Court's attention to two very recent decisions, *Richardson* v. *Communications Workers,* 91 LRRM

[16] See Wright and Miller, p. 13, n. 2 *supra*.

2506 (C.A.8),[17] and *Jamison Co., Inc.* v. *Westvaco Corp.*, 526 F.2d 922 (C.A.5, Feb. 6, 1976).[18]

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[17] "Neither was there an abuse or discretion in failing to limit the new trial to damages only. The nature of the case was such that the liability and damages issues were interwoven to such an extent that a trial on damages alone would have been inappropriate. Plaintiff's claim for mental anguish and humiliation involved conduct by a larger number of individuals over a seven-month period. In determining damages to be awarded against the Local or International, or neither or both, it was necessary for the jury to determine who committed what acts and the responsibility of the parties under applicable principles of agency. Thus the issues of damages and liability were so intertwined as to be inseparable. Under these circumstances a partial trial on damages alone would have been improper. See Gasoline Refining Co., 283 U.S. 494, 500 (1931); Vidrine v. Kansas City Southern Railway, 466 F.2d 1217, 1221 (5th Cir. 1972); United Air Lines, Inc. v. Wiener, 286 F.2d 302, 306 (9th Cir. 1961). No abuse of discretion in granting a new trial on all issues arising under the mental anguish claim has been shown here." *Id.* at 2508.

[18] "Because this litigation is nearly six years old and because the original trial lasted three weeks, we hesitate to require a new trial on all issues. However, the district court's use of a general verdict leaves us no alternative.

"Generally, in cases such as this, the appellate court avoids a wasteful retrial of the entire controversy through the use of one of two devices.

* * *

"The second device for avoiding a full retrial is a partial new trial limited to the damage issues. *See generally* C. Wright & A. Miller, *supra* at § 2814 (1973). Unfortunately, our uncertainty as to the jury's resolution of the liability issue also forecloses this method. Without a prior determination of the basis for liability, the district court on remand for a partial new trial would be unable to instruct the jury as to damages. In other words, partial remand is permissible only where one has a definite furcation. Here, the contractual obligations and damages flowing from their breach are not separable, but rather are inextricably bound together. They are not independent, but are interdependent. Justice commands that we sunder them not, notwithstanding our quest to avoid unnecessary and repetitious judicial efforts." *Id.* at 935-936.

However, the problem raised by the decision below is particularly acute in suits under § 303 of the Act, where the instant proceedings provide a model for evading the Congressional decision to restrict damages which a plaintiff may recover to losses proximately caused by conduct violative of § 8(b)(4) and to deny recovery for losses proximately caused by lawful primary strike activity, which Congress has chosen to protect. Thus, we submit that this phase of the case also presents an important question in the administration of the labor laws and of assuring fidelity to this Court's decision in *Morton*.

II. BY RELIEVING PLAINTIFF OF THE BURDEN OF PROVING THAT IT SUFFERED LOSSES "BY REASON OF" A VIOLATION OF § 303, THE COURT OF APPEALS DEFEATED CONGRESSIONAL POLICY AS DECLARED IN MORTON.

As we have seen, at the second trial (as at the first) the plaintiff introduced evidence only of its total strike losses; it did not offer any evidence connecting any illegal act (whether it had been before the first jury or not) with any loss. IBT contended before the trial court, and in the Court of Appeals that the plaintiff had thereby failed to meet its burden of proof with respect to any damage, and was therefore not entitled to go to the jury at all. The Court of Appeals rejected this contention in reliance on the authority of *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, which holds:

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, *it would be a perversion of fundamental principles of justice to deny all relief to the injured person and thereby relieve the wrongdoer from making any amends for his acts.* In such a case, while the damages may not be de-

termined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result may be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise." *Id.* at 562-563, emphasis added to show the portion quoted at App. 25a.

The Court of Appeals' ruling (a) misconceives the rule of the *Story* case; (b) undermines the holding of *Morton supra,* that a plaintiff may recover only for damages proximately caused by unlawful conduct, by adopting an argument which was unsuccessfully advanced in that case and, (c) is in conflict with decisions of other Circuits which place upon the plaintiff the burden of proving the fact of causation. This issue is one of recurring importance in the administration of the Act, since it can arise in any § 303 suit, (whether or not the District Court has improperly bifurcated the trial of liability and damages). It therefore independently warrants the grant of certiorari.

There are three separate reasons why the *Story* rule does not sanction the trial court's action: 1) The *Story* rule comes into play only where plaintiff has established the fact of damage caused by defendant's wrongful acts; 2) plaintiff here did not bring itself within *Story,* because it did not demonstrate that it would be impossible (or even burdensome) to prove more precisely the damages thus caused, much less that any difficulties in proof were created by defendant's tortious conduct; and 3) *Story* does not state the rule for apportioning losses between those resulting from defendant's tortious con-

duct, and those lawfully inflicted by defendant in primary strike activity, as *Morton* requires.

1. The distinction between proof of the fact of damage and the amount of damage is expressly drawn on the face of the *Story* opinion:

> "This characterization of the basis for the verdict is unwarranted. It is true that there was uncertainty as to the extent of damage; but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damage applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount." (282 U.S. at 562.)

In the present case, Great Coastal failed to show that even "some damage" had been caused by secondary activity because it showed only that it had incurred losses due to the strike, which included lawful activity. Since Great Coastal made no showing—it has not demonstrated the *fact* of damages—the question of "the measure of proof necessary to enable the jury to fix the amount" of damage (*Story* at p. 562) simply does not arise.

2. In relieving plaintiff of the obligation of fixing the amount of damages with certainty, the *Story* case did not hold that speculation as to the amount of damages is desirable or that tortfeasors as a class should be punished by allowing tort victims to recover speculative damages. Rather, the *Story* rule is one of necessity and fairness: Where the uncertainty is inherent in the tort, it is believed to be more just that the tortfeasor rather than the victim bear the uncer-

tainty. See also *Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251, 265.[19]

In the present case, Great Coastal made no showing of its "inability to prove complete and accurate data from which his loss can be ascertained", nor of course that such an inability was "the effect of the defendant's wrongful act." On the contrary, the nature of the case is such that Great Coastal could readily have established its proximately caused damages with specificity.[20] If any of its customers had in fact stopped doing business with it as a result of unlawful secondary activity, Great Coastal could have produced those customers as witnesses. It could also have produced *bona fide* business records to show how many, if any, deliveries were turned away by customers because of unlawful secondary activity, and the consequent damages. Mr. Estes testified that the reason Great Coastal Express was unable to maintain a list of shipments that could not be delivered during the strike was that "[i]t would cost money," (II JA 808) although he had previously admitted that he did not know what

[19] The Court of Appeals characterized the holding in *Story* as applying "where the amount of damages cannot be ascertained with certainty" (App. 25a). It omitted that portion of the sentence which it quoted which states the qualification (on which we had relied, and on which we rely here) "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty". See the sentence in full at p. 33 *supra.*

[20] The trial Judge also felt more specificity was possible:

THE COURT: . . . "Counsel should know, and the Court of Appeals should know . . . I have serious doubts . . . that this is a case in which damages could not have been shown with more specificity. I just cannot imagine not being able . . . [to have] . . . some sort of a record to show reasonable shipments that [Great Coastal was] not able to make . . . because of a particular illegal conduct on the part of the defendant." (II JA 911)

kinds of records were kept. (II JA 807) The *Story* rule does not place on the defendant the onus for plaintiff's failure to keep adequate records. To allow the plaintiff to recover damages which he did not show to be caused by defendant's unlawful conduct is to convert the *Story* rule of necessity and fairness into an instrument of injustice whenever the plaintiff as a matter of choice fails to present evidence which will remove, or lessen, any uncertainty as to the damages which plaintiff is entitled to recover. And where as here, the plaintiff, rather than the defendant had or could have had records which would enable it to establish the damages proximately caused by the defendant's illegal conduct, the result reached below reverses "the ordinary rule, based on consideration of fairness, [which] does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary. *United States* v. *New York, N. H. & H. R. Co.,* 355 U.S. 253, 256, note 5." *Campbell* v. *United States,* 365 U.S. 85, 96. See also, *South Carolina* v. *Katzenbach,* 383 U.S. 301, 332.

3. Additionally, the *Story* rule does not deal with the question of proof of damages where plaintiff's total loss is known or ascertainable, but he is lawfully entitled to recover only a portion of that loss. That is the issue in the present case. That *Story* is not applicable can be demonstrated both by analysis and authority.

In the typical anti-trust case, for example, where the plaintiff is seeking to recover for the loss of business, *Story* permits the jury to infer the amount of that loss from evidence regarding the plaintiff's business prior to the anti-trust violation. The validity of that inference depends on the assumption that but for

the violation the plaintiff's business would have remained the same (or would have improved at some uniform rate). Absent any other cause for the plaintiff's loss, that assumption is reasonable. But where that assumption cannot be made because it is shown that other circumstances may have contributed to plaintiff's losses, the inference is purely arbitrary. It is this latter situation which obtains here, since it is undisputed that there was a strike in which the plaintiff was lawfully subject to economic injury inflicted by the defendant, and in which defendant engaged in such activity.

The distinction which we draw has been understood in applying *Story* in the anti-trust field. Compare *Momand* v. *Universal Film Exchanges,* 172 F.2d 37, 42 (C.A. 1) with *id.* at 43. It also accords with the general theory of the law of torts as declared in the A.L.I. Restatement of Torts, 2d.

The relevant sections of the Restatement are 433A (defining the situations in which apportionment should be made) and 433B (assigning the burden of making the apportionment). In Section 433A, the Restatement does indeed provide that apportionment is proper even where one of the causes is innocent or privileged. See, e.g., Comment (e), "Innocent Causes", which states in part:

> "Apportionment may also be made where a part of the harm caused would clearly have resulted from the innocent conduct of the defendant himself, and the extent of the harm has been aggravated by his tortious conduct."

But Section 433A does *not* purport to state who has the burden of proving that apportionment, and instead

expressly provides, in Comment (g), that all burden of proof questions are dealt with in Section 433B.

Section 433B(1) states the general rule on burden of proof, which is to be applicable except in the specific situations detailed in 433B(2) and (3). The *general rule* is that "the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff" (Section 433B(1)). The two exceptions deal with the situations either where the plaintiff has been injured by two causes each of which is tortious, or where it is proved that two persons acted tortiously and the harm was caused by only one of them; in these situations, the Restatement recommends that the burden be placed on the tortfeasors to allocate responsibility between themselves (Section 433B(2) and (3)).

Thus, the Restatement does *not* place the burden of making the apportionment upon the defendant where there are both tortious and innocent causes. On the contrary, since this situation is not covered by the exceptions, it is governed by the general rule enunciated in Section 433B(1) and "the burden of proof . . . is upon the plaintiff."

Other courts of appeals have recognized that it is the burden of the plaintiff in a § 303 suit to establish the fact of damage and have understood that *Story* does not do away with this burden, but rather relieves the plaintiff of the need to prove damages to a certainty, permitting a just and reasonable approximation. See *e.g., Landstrom* v. *Chauffeurs, Teamsters, Etc., Loc. U. No. 65,* 476 F.2d 1189, 1194-1195; *Refrigeration Con., Inc.* v. *Local Union No. 211, Etc.,* 501 F.2d

668, 670-671 (C.A. 5); *Mead* v. *Retail Clerks Int. Ass'n, Etc.*, 523 F.2d 1371, 1376-1379 (C.A.9).[21]

3. The proposition asserted by the Court of Appeals was advanced by the respondent in *Morton*, who contended:

> "The most that can possibly be correctly said for the Teamsters Union's position is that it is uncertain as to how many of Respondent's truck drivers failed to report to work during the strike because of (1) the Teamsters Union's secondary activity violative of Section 303, LMRA, (2) the Teamsters Union's secondary activity violative of the state common law, or (3) only because of the picket line at Respondent's garage. The Teamsters Union introduced no testimony of any driver-employees, if there were any, who stayed away ONLY because of the picket line at Respondent's garage. The District Court found as a fact that the Wilson job was lost as a result of a combination of the Teamsters Union's lawful and unlawful strike activity (R. 274).
>
> If there is any uncertainty about the Wilson element of damages, i.e., the number of Respondent's drivers who failed to report to work for duty on the Wilson job because of (1) the Teamsters Union's unlawful secondary activity on the one hand and (2) the Teamsters Union's picket line at Respondent's garage on the other, then not the Respondent but the wrongdoer, the Teamsters

[21] One significant distinction between this case and *Mead* should be pointed out to avoid confusion. In *Mead* the plaintiff contended that the entire strike was prohibited by § 8(b)(4)(D); if that position were sustained, it would be entitled to its total strike losses.

> Union, should suffer the consequences of the uncertainty being resolved against it."[22]

This proposition was sought to be supported by the authority of *Story Parchment,* its successor *Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251, and related cases, in an elaborate discussion.[23]

The Court's opinion, holding that Morton could not recover for losses on the Wilson job because a plaintiff in a § 303 suit can recover only for damages proximately caused by a violation of § 8(b)(4) (377 U.S. at 261-262) tacitly rejected this argument. It would appear that the Court regarded it as too obvious to require comment that the requirement that the plaintiff show that his losses were "by reason of" a violation of § 8(b)(4) requires the plaintiff to prove the fact of proximate cause, and that this requirement is entirely consistent with the *Story-Bigelow* rule. For, as the present case illustrates, unless the plaintiff in a § 303 suit must prove the causal nexus between unlawful activity and strike losses, the plaintiff will be enabled to recover for losses caused by lawful activity and, if the decision is permitted to stand, the success of Great Coastal's strategy in submitting evidence of its total strike losses only, will provide a model and an incentive for other employers to similarly misuse the § 303 remedy.

[22] Brief for Respondent, No. 485, October Term 1963, pp. 16-17. Compare with the sentence beginning "The Teamsters Union introduced no testimony" the statement of the Court of Appeals herein: "The defendant had every opportunity, in the second trial as at the first, to contest both the proximate cause of the damage as well as its amount, and yet offered no evidence" (App. 31a).

[23] *Id.* pp. 17-23. Morton quoted the same passage from *Story Parchment* which we have set forth above, *id.* 17.

CONCLUSION

By reason of the foregoing this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX B

Statute and Rule Involved

Sections 8(b)(4)(B) and 303 of the Labor-Management Relations Act 1947 provide as follows:

Section 8(b(4)(B):

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * *
>
> (4)(i) to engage in, or or induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of this Act: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful where not otherwise unlawful, any primary strike or primary picketing;
>
> * * *
>
> *Provided,* That nothing contained in this subsection shall be construed to make unlawful a refusal by

any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution

§ 303:

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of this Act.

(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 of this Act without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit. (June 23, 1947, ch. 120, title III, § 303, 61 Stat. 158; Sept. 14, 1959, Pub.L. 86-257, title VII, § 704(e), 73 Stat. 545.)

APPENDIX C

Instances of Possible Secondary Boycott Activity Established by Plaintiff at First Trial

1. *Linoleum Distributors:* Charles Byrd, the owner of a Richmond wholesale linoleum distribution establishment, testified that in the latter part of October, 1970, he arrived at his place of business where his employees were refusing to unload a Great Coastal truck. Two strikers handed him a copy of the letter to customers and asked him not to unload the truck. They made no move to stop anyone from unloading the truck and moved off the premises at his request. Whereupon Mr. Byrd, the strike-breaking driver and Mr. Byrd's employees then unloaded the truck without interference (I JA 157-161). A Great Coastal replacement driver, Jimmy Shepherd, testified that prior to Byrd's arrival, striker Jack Beck asked the shipping foreman not to unload the truck (I JA 265-266). Byrd testified that his company, which was a consignee and not a shipper, did not thereafter request those who shipped goods to Linoleum Distributors not to ship via Great Coastal.

2. *Southern Special Products Corp:* Donald Guertin, the traffic manager of Southern Special Products Corporation, in Richmond, testified that within approximately a week after the strike began, he received the letter from Local 592's president, William Hodson, announcing the strike and requesting that he cease doing business with Great Coastal. Shortly after he received the letter, Guertin said he was visited in his office by Hodson and a Mr. Shelton, Local 592's business agent. They asked him if he was aware of the strike and said that "if I continued to use Great Coastal it would become necessary for them to place pickets

in the vicinity of the plant" (I JA 167). A few weeks later Southern Special Products ceased doing business with Great Coastal. Guertin testified that this was not because of the Hodson-Shelton visit, but was due to the request of his consignees (I JA 168, 170).

3. *Metal Bank of America:* A replacement driver, Samuel Rogers, testified that on one occasion in August 1970, soon after the strike started, he drove a Great Coastal truck to the Metal Bank of America in Philadelphia. He was followed by two strikers in a private automobile (I JA 193-194). When they arrived at their destination, the two strikers spoke to "the crane operator who was to unload us" informing him of the strike and requesting him not to unload the freight (I JA 196-198). Rogers testified that he had not since that time delivered any Great Coastal freight to the Metal Bank of America (I JA 198).

4. *The Milltown Paper Products Company:* Mr. Rogers also testified that on one occasion he "went up to Milltown up there where they make certain paper products" and that a roving picket asked the shop steward of the consignee not to unload the freight. The shipping foreman told Rogers to drop the trailer, that the employees of the paper company would unload it and that Rogers should return later to pick up the unloaded trailer (I JA 282).

5. *Little Falls Laundry:* A replacement driver, Jack Howell, testified that he once pulled up to the Little Falls Laundry in Little Falls, New Jersey with a truckload of freight, and that a number of strikers "hollered over there and told them not to give me any directions or any information because they were on strike" (I JA 232). At the time, Howell was engaged in conversation

to find out where to unload his freight (I JA 231). The load was not accepted (I JA 232).

6. *Mutual Paper Company:* A replacement driver, Robert Seward, testified that on one occasion when he attempted to deliver a load of freight to the Mutual Paper Company in Brooklyn, New York, two strikers "talk[ed] to people on the dock" after which the load was refused (I JA 247, 250).

7. *Hermetite Company:* A replacement driver, Jimmy Shepherd, stated that a load he was driving was once refused at the Hermetite Company in New Jersey following a conversation he did not overhear between a striker and a man variously described as a "shipping clerk," "foreman," and "shipping foreman" (I JA 264-265).

8. *Belwood:* A replacement driver, Mack Fifer, testified that once when he was driving in his private automobile to the Defense General Supply Center at Belwood to load a Great Coastal trailer left there the previous day, he observed striker Hubert Bailey near the Belwood gate (I JA 331). Fifer drove around trying to lose Bailey who was in a pickup truck, and then entered the Belwood installation and began loading the trailer (I JA 331-332). When he had partly completed his task, he was called into the office by someone and asked to cease loading the trailer and to leave the base (I JA 332-333). On his way out he observed a picket line and saw Mr. Hodson take the picket line down and wave to a truck parked at the gate (I JA 333).